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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. [redacted] 199

GABRIEL DIAZ, RAY BAKER, JOHN FANNON and RONALD VINCENT PECCIA,
Petitioners and Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, No. 20488 of the Criminal Docket of said Court.

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	11
Proof of Service	15
Appendix A . . . Opinion and judgment below	16
Appendix B . . . Order denying rehearing	19
Appendix C . . . Stay of mandate	20

Citations

Alcorta v. Texas (1957) 355 U.S. 28, 2 L. Ed. 2d 9, 78 S.Ct. 103	11
Petrilli v. United States (1942) 129 F. 2d 101	11
Read v. United States (1930) 42 F. 2d 636	12

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UNITED STATES OF AMERICA,
Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Gabriel Diaz, Ray Baker, John Fannon and Ronald Vincent Peccia pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause in proceedings No. 20498 of the Criminal Docket of said Court on February 23, 1965 and as to which a rehearing was denied on April 30, 1965. (R. 787, 809) A stay of the mandate of the said Court was granted on May 10, 1965 for a period of thirty days from April 30, 1965 for the purpose of

permitting petitioners to apply herein for a writ of certiorari. (See appendix)

CITATION TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported in 341 Federal Reporter, 2d 912. No opinion was rendered in the denial of a rehearing, copy of which order is reproduced in the appendix herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on February 23, 1965, (R. 787, 789) an extension of ten days additional time in which to apply for a rehearing was granted on March 15, 1965 (R. 791) and the application for rehearing was timely filed on March 26, 1965. (R. 792) Rehearing was refused, without rendition of an opinion, on April 30, 1965. (R. 809) Thereafter a stay of mandate, for the purpose of applying for certiorari was issued for a period of thirty days from April 30, 1965. (See appendix)

The jurisdiction of this Court is invoked under Title 28 USC Sec. 1254.

QUESTIONS PRESENTED

1. In a criminal case involving a prosecution for interstate shipment of forged bonds, where a principal issue is the good faith of the defendants in believing the bonds to be genuine, is it a violation of due process for the Government to produce before the jury evi-

dence that one defendant used an alias in dealing with third parties concerning said bonds, where the Government, even prior to trial had full knowledge by reason of its own witnesses and documentary evidence that no such alias had been used at any time?

2. Assuming that it was a violation of due process for the government to have attributed falsely to one defendant the use of an alias, under the circumstances set forth in Question 1, supra, was such error sufficiently prejudicial as to the rights of all defendants, charged as conspirators, to warrant a reversal?

3. In a prosecution of five defendants for interstate transportation of forged bonds, is it reversible error for the trial Judge to grant a judgment of acquittal as to one defendant, charged as a conspirator with the other four defendants, without informing counsel of such proposed action before they make their argument to the jury?

4. In a prosecution for interstate transportation of forged bonds, where the indictment sets forth in separate counts the transportation of two separate sets of forged bonds, is it reversible error for the government to be permitted to offer evidence of dealings in an entirely different set of bonds, involving different parties and different cities, not referred to in the indictment?

5. Assuming that there is no reversible error, per se, in admitting evidence of the transactions relating to bonds and parties not named in the indictment, in the hypothetical question presented in Question Number 4, supra, does the admission of hearsay evidence via

long distance telephone calls relative to death threats in connection with such extraneous bond transactions constitute reversible error?

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States.

Rule 30 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

This case involved an appeal by the four remaining defendants from a conviction and sentence under an indictment based upon Title 18, United States Code, Section 2314, relative to the transportation in interstate commerce of certain allegedly forged securities, namely two separate sets of one thousand dollar bearer bonds of Shell Union Oil Corporation maturing April 1, 1971 and carrying interest at the rate of 2-1/2 percent. (R. 1, 2) One other defendant Milton Cohen, a New Orleans attorney, WAS ACQUITTED, receiving a directed verdict of acquittal as to Count One and being acquitted by the Jury as to Count Two.

From the outset of the trial, a principal issue was the bona fides of the various defendants as to a belief that the bonds were genuine. This question was obvious in view of the numerous persons, not indicted, who dealt or attempted to deal in the very bonds involved and the entirely plausible circumstances under which they were offered for sale. One original defendant, Milton Cohen, received a directed verdict of acquittal as to one count and was acquitted by the

jury on the remaining counts and the Court's stated reason for directing an acquittal on one count was the lack of proof as to his guilty knowledge as to the fraudulent nature of the bonds. (R. 744)

BONDS VALID AS TO APPEARANCE AND CIRCUMSTANCES

There is overwhelming evidence in the record to show that the bonds, on their face, were apparently genuine and were of such a quality as to convince experienced persons, including one bank, of their genuineness. Thus one bank in New Orleans, after having a batch of these bonds examined by its expert, accepted the bonds as security for a seven thousand five-hundred dollar loan. (R. 182, 187) No suspicion arose in the minds of the bank officials as to the genuineness of the bonds until after the case broke and the FBI swooped into the bank and seized the bonds as evidence.

An experienced investor in New York, after having the bonds examined by a trusted adviser, issued a check for $65,000 for the purchase of similar bonds, and did not retreat from his contract to purchase same until advised of other facts having no relation to the nature or appearance of the bonds themselves. (R. 663, 664)

Numerous investors and experts in bond deals examined the identical bonds involved here and conducted protracted negotiations for their purchase. (R. 145, 180, 658)

The confusion in the record as to how the bonds got into circulation is simply due to the fact that the Government abandoned its original theory as to the origin of the bonds as set forth in its response to a motion for a bill of particulars. Thus, in its response to an order acquiring certain particulars, the Government had pleaded: (R. 30)

> "The government expects to produce evidence that: (a) The connection which existed between the defendant, John Fannon, and defendants, Diaz and Baker, was *that Baker furnished Fannon a genuine Shell Union bond which was used for the purpose of making the counterfeits described in the Indictment; that Fannon, Diaz and Baker were aiders and abettors, inducers and procurers, and did wilfully cause the illegal transportation charged in the first and second counts and were conspirators as alleged in the third count.*
>
> (b) The defendants Diaz and Baker were aiders, abettors, inducers and procurers, and did wilfully cause the illegal transportation charged in the first and second counts and were conspirators as alleged in the third count." (Emphasis added)

Although the supposed furnishing of a single genuine bond by Baker to Fannon, said to have been used as a sample for the production of allegedly forged securities, was the foundation stone in the government's case, *this major contention disappeared without trace or explanation of any kind.* Instead of showing that "Baker furnished Fannon a genuine Shell Union bond

which was used for the purpose of making the counterfeits . . ." the Government made a mysterious "switch" and *substituted a thoroughly confusing series of innuendos as to where and how the counterfeit process started.*

The Government abandoned its pleaded case (as to the origin of the bonds) and simply set forth a series of transactions *after the bonds had been put into circulation from some undisclosed source.* The initial proof consisted of testimony by one Leo Heyman, not indicted, as to his negotiations with the defendant Milton Cohen, who later received a directed acquittal as to one count and was acquitted by the jury on the remaining counts. In the course of this testimony Heyman related that he became drawn into the bond deal when the defendant Cohen told him over the phone that he had a client who wished to dispose of some bonds belonging to a refugee from Cuba, one Eduoardo Menendez, who was obliged to sell same. (R. 180) Heyman, as a government witness, then testified on direct examination that *when he met Cohen to discuss the bonds the defendant Diaz was represented as being Menendez.* (R. 181, 183) On cross examination however, Heyman *admitted that Diaz had never been introduced to him under any other name than Diaz and that he had never represented himself to any other parties in his presence under a false name.* (R. 226)

Long after the supposed use of the alias by Diaz had been completely exploded by the testimony of the government's own witness, plus other strong circumstantial evidence, the government again injected the false and prejudicial claim as to the use of an alias by Diaz by means of testimony of an FBI agent as to

the substance of *what the defendant Cohen had told him, the FBI agent, as to his relations with Diaz, after the conclusion of the conspiracy.* (R. 687)

In Volume III, page 795, of the printed record filed herewith there appears, in the printed application for rehearing, a detailed discussion of the highly prejudicial impact of the conduct of the Government in persistently putting before the jury false evidence as to the supposed use of an alias by the defendant Diaz. This point, covering some eleven printed pages of the application for rehearing, *is not mentioned in the opinion below.*

For the purposes of this application it is impossible to present, even in outline form, the basis of the other facets of the case, as suggested in the remaining "Questions Presented Above". We can merely state that the Government, having abandoned its pleaded theory of the case, was permitted to bring in evidence of a wholly unrelated conspiracy as to an admittedly different set of bonds, for the expressed purpose of showing guilty knowledge by one defendant. (R. 609 through 677) In the course of presenting this wholly unrelated conspiracy, the Government was permitted to bring in rank hearsay in the form of unidentified long distance telephone calls as to death threats against one of the bond prospects. (R. 623)

Finally, and we merely sketch this error, when the trial Judge had a discussion with trial counsel as to the instructions he would give the jury, he gave no indication whatever as to the fact that he was going to direct an acquittal as to the defendant Cohen on one count. His stated reasons for doing so was the lack of any

guilty knowledge by Cohen at the early stage of the transactions. (R. 744) Since the obvious defense of the other defendants was that they had no more guilty knowledge than Cohen, it was urged that counsel should have been informed of the Court's plan to direct an acquittal as to Cohen, so that this argument could be made to the jury.

The Court of Appeals, in a per curiam opinion, disposed of the twelve specifications of error in one fell swoop in the following words: (See R. 787 and appendix)

"The appellants specify numerous errors, *inconsistencies in the jury verdict, improper jury instructions,* the *refusal of requested instructions,* lack of sufficient proof, *failure of the government properly to respond to a motion for a Bill of Particulars,* incorrect rulings on the admissibility of evidence, the action of the court in directing the acquittal of one defendant, denial of a severance, and undue limitation of cross examination on behalf of the defendants." (Emphasis added)

The emphasized portions of the per curiam above represent gross errors in the Court's summation of what the case was about and what was specified as error. As pointed out in detail in the printed application for rehearing: (R. 793 et sequo)

1. There was no specification of error based on inconsistencies in the jury verdict;

2. There was no specification of error whatever based on either improper jury instructions or refusal of any instructions;

3. There was no specification of error based on a failure of the Government to respond to any motion for Bill of Particulars. On the contrary, appellants contended vigorously that, after responding to a motion for Bill of Particulars and filing the required statement of details as to origin of the bonds, the Government then abandoned its formal pleading and proved up an entirely different case.

Most important, as pointed out in the printed application for rehearing, the opinion failed to state one word relative to the basis upon which Specification of Error Number Two was rejected. Under this specification appellants had urged all of the prejudicial effect of the Government's misconduct in falsely presenting to the jury evidence that the defendant Diaz had used an alias in dealing with third parties relative to the bonds and had represented himself as one Eduoardo Menendez. (See application for rehearing, R. 795 through 807) This error culminated with the introduction in evidence of the statements to the FBI agent by defendant Cohen after the termination of the conspiracy. This final phase of the Government's highly prejudicial misconduct in continuing to parade before the jury false evidence as to the supposed use of an alias by the defendant Diaz, occurred in the latter stages of the case, *long after the Government's own witness, Heyman, had flatly admitted on cross examination that Diaz had never used an alias and that he had always, from the very outset, known him by his right name.* (R. 687)

Thus, this major contention of appellants, remains untouched by the Court of Appeals in its one paragraph, eight line opinion.

REASONS FOR GRANTING THE WRIT

If the Court of Appeals, in disposing of the contention as to the prejudicial effect of the Government's repeated mis-use of the alias testimony, had expressed any rationale for rejecting the appellants' contentions, it would doubtless be possible to present to this Court a conflict between such opinion and those of other Circuit Courts of Appeal, as well as a conflict between such opinion and the holdings of the Supreme Court itself. For it has been held consistently for many years that the suppression of evidence by the prosecution or use of testimony known to be false by the prosecution where such evidence bears upon an important issue, constitutes denial of due process.

In *Petrilli v. United States,* (CCA 8, 1942) 129 F. 2d 101, the Court, while recognizing the prejudicial effect of unwarranted attribution of an alias, found that the prosecution acted in good faith and that the prosecuting attorney was in a position to prove up the 28 alias attributed to the defendant in reading the indictment to the jury.

In *ALCORTA V. TEXAS,* 355 U.S. 28, 2 L. Ed. 2d 9, 78 S. Ct. 103 (1957) this Court set aside a conviction for murder where the State had knowingly relied on perjured testimony. As an annotation to said opinion, there appears an exhaustive collection of cases relative to the fatal effect of deliberate use of perjured testimony in a criminal prosecution. (See 2 L Ed. 2d at page 1575 et sequo).

In Modern Federal Practice Digest, Vol. 10, "Constitutional Law", Key Number 266 (L), page 714, there

are collected numerous cases from all jurisdictions to the effect that suppression of material evidence by the prosecution is a denial of due process, which may constitute reversible error.

On this point the philosophy of all reported cases may be summed up in the words of the Eighth Circuit Court of Appeals in *READ V. UNITED STATES*, 42 F. 2d 636, 645 (1930) where that Court declared:

"It is the duty of a prosecuting attorney to assist in giving a fair trial to a defendant. *The government cannot afford to convict its citizens by unfair means.* (Emphasis added)

The difficulty here is that the Court of Appeals has simply ignored this main contention of all appellants. It is impossible to show any inconsistency between any rule enunciated in this case and the veritable raft of cases from other jurisdictions *because this case enunciates no rule*. No suggestion is made that the error as to the use of the alias testimony was not properly raised or presented. The point as to the alias was squarely raised by Specification of Error Number two and by the repeated objections and motion for mistrial below. No suggestion is made that the misuse of the evidence as to a supposed alias was not prejudicial, and it is inconceivable that any such contention could be made. No explanation whatever is made as to why the grossly prejudicial conduct of the Government as to the false alias testimony is not even considered, one way or the other, by the Court of Appeals.

In the last paragraph of the per curiam the Court makes its closest approach to actually discussing the case in these words:

"A careful examination and analysis of the various questions presented and *skillfully raised by appellants* during a rather extended trial, fails to convince us that prejudicial error was committed." (Emphasis added)

Thus, without more discussion, with kind words for counsel but no reasons for judgment, the appellants are swept up into a vacuum cleaner of ambiguity and their only hope of rescue is the possibility that someone will be curious as to what went into the bag.

The "careful examination and analysis of the various questions presented" has produced no concrete results except a gross distortion of what the appeal involved and the Court of Appeal was squarely confronted with these flat errors in the application for rehearing. (R. 792 et sequo).

The highly prejudicial misconduct of the Government in regard to misuse of the alias testimony is set forth in great detail in an eleven page treatment in our printed application for rehearing, with quotations of testimony and record references. It cannot be repeated in detail here for obvious reasons. (R. 795 through 805)

NATIONAL SIGNIFICANCE

The highly prejudicial error complained of here in regard to the Government's flagrant misuse of the supposed alias testimony here presents an issue which clearly transcends the horizons of this particular case. In these days of an ever increasing power at the Fed-

eral level, there is more need now than ever that the integrity of the judicial process be preserved and that the public know that it is being preserved zealously by our Courts. While these particular appellants are not persons of public status, and their conviction will not cause crowds to picket in protest or editors to editorialize in indignation, what was condoned here by a technique of evasion does indeed present a very real threat to the liberties of many.

For, if a serious charge such as this, a charge that the Government *deliberately and with full knowledge of its falsity* paraded before the jury false evidence as to use of an alias which it well knew to be untrue, can be simply ignored on appeal, then there is no limit to the mischief which can be "swept under the rug" in this fashion. If such conduct can be condoned in silence then, with the tremendous resources of the Federal Government as to investigative manpower and opportunity to manipulate evidence, there is real danger that almost anything can be overlooked and the day of the Police State may well be at hand. As it stands today this case presents a gentlemanly shrugging off of the constitutional rights of these four appellants with an air of "What's the Constitution among friends?" We prefer to believe that this Court, as busy as it doubtless is, endorses the sentiment expressed in the Read case, supra and feels that:

"The government cannot afford to convict its citizens by unfair means."

We respectfully pray that a writ of certiorari be granted, that the judgment of the Fifth Circuit Court

of Appeals be reversed and that the case be remanded for a new trial.

Respectfully submitted,

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and Appellants

PROOF OF SERVICE

I, G. W. Gill, attorney for petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for Writ of Certiorari upon the Solicitor General of the United States and upon the United States Attorney for the Southern District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La. May _____, 1965.

G. W. Gill

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON, and RONALD VINCENT PECCIA,
Appellants,
versus
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 23, 1965)

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: The appellants were convicted and sentenced under a three count indictment which charged violations of 18 U.S.C. § 2314 relative to the transportation in interstate commerce of certain allegedly forged securities. Counts One and Two charged interstate transportation of Shell Union Oil Corporation bonds knowing the same to have been counterfeited. Count One charged that 11 of such bonds were

transported from New Orleans, Louisiana to Miami, Florida, and Count Two that 146 were transported from Chicago, Illinois to Miami, Florida. Count Three alleged a conspiracy to commit the acts set forth in Counts One and Two. One defendant was found guilty on all three counts; one on Counts Two and Three; one on Count Three; and one on Counts One and Three. As to another defendant, the court directed a verdict of acquittal under Count One and the jury acquitted him on the remaining two counts.

The appellants specify numerous errors, including inconsistencies in the jury verdict, improper jury instructions, the refusal of requested instructions, lack of sufficient proof, failure of the Government properly to respond to a motion for a Bill of Particulars, incorrect rulings on the admissibility of evidence, the action of the court in directing the acquittal of one defendant, denial of a severance, and undue limitation of cross-examination on behalf of the defendants.

Counsel for the appellants have strongly urged their contentions by brief, oral argument, and supplemental brief. A careful examination and analysis of the various questions presented and skillfully raised by the appellants during a rather extended trial, fails to convince us that prejudicial error was committed.

The judgment is AFFIRMED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1965

Issued as Mandate:

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON,
and RONALD VINCENT PECCIA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida

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April 30, 1965

ON PETITION FOR REHEARING

Before WISDOM and GEWIN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20498

GABRIEL DIAZ, RAY BAKER, JOHN FANNON, and RONALD VINCENT PECCIA,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from April 30, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from April 30, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from April 30, 1965 unless

the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Walter P. Gewin
United States Circuit Judge.

(ORIGINAL FILED MAY 10, 1965)

Dated: